

**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

1 MUR: 6263  
2 Date Complaint Filed: March 16, 2010  
3 Date of Notification: March 23, 2010  
4 Date of Last Response: May 11, 2020  
5 Date Activated: May 27, 2010  
6  
7 Expiration of Statute  
8 of Limitations: April 15, 2014  
9  
10 **COMPLAINANT:** Rev. Frederick J. Zylman, III  
11  
12 **RESPONDENTS:** The Committee to Re-Elect Artur Davis to  
13 Congress and Byron Perkins, in his official  
14 capacity as treasurer  
15 Artur Davis 2010  
16 Katie Baker  
17  
18 **RELEVANT STATUTES**  
19 **AND REGULATIONS:** 2 U.S.C. § 434(b)  
20 2 U.S.C. § 439a(a)  
21 2 U.S.C. § 439a(a)(5)  
22 2 U.S.C. § 439a(a)(6)  
23 2 U.S.C. § 439a(b)  
24 11 C.F.R. § 101.1  
25 11 C.F.R. § 113.1(g)  
26  
27 **INTERNAL REPORTS CHECKED:** Disclosure Reports  
28  
29 **FEDERAL AGENCIES CHECKED:** None

30 **I. INTRODUCTION**

31 The complaint alleges illegal expenditures and misuse of campaign funds by The  
32 Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his official  
33 capacity as treasurer, ("Committee") directly for the benefit of Artur Davis 2010,  
34 Davis's campaign for Alabama governor, and Katie Baker, Finance Director of Artur  
35 Davis 2010. Specifically, the complaint alleges that the Committee violated the personal

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1 use prohibition of the Federal Election Campaign Act of 1971, as amended ("the Act"),  
2 set forth at 2 U.S.C. § 439a(a)(5) because the Committee allegedly violated Alabama law  
3 in connection with the donations. Essentially, the complainant alleges the Committee  
4 violated state law by (1) failing to timely file the principal campaign committee form in  
5 January 2009 upon spending more than \$25,000 on the state campaign; (2) making  
6 expenditures from the federal campaign account to pay state campaign expenditures, such  
7 as polling, office rent, travel and payroll before June 1, 2009; (3) using the federal  
8 campaign account to raise money for the benefit of the state campaign during the period  
9 when Alabama candidates would have been prohibited from fundraising; and (4) failing  
10 to report the federal campaign expenditures on behalf of the state campaign on the state  
11 campaign's annual report for 2009. The Committee responds that (1) Artur Davis did not  
12 become a candidate for Governor until April 17, 2009; (2) the allegation that it violated  
13 state law is similar to the allegation in MUR 5826 (Mark Green for Congress) in which  
14 the Commission determined that a violation of state law does not create a violation of  
15 2 U.S.C. § 439a(a)(5); and (3) the complaint does not allege any violation of any other  
16 statute or regulation over which the Commission has jurisdiction. Therefore, the  
17 Committee states, the Commission should find no reason to believe that the Committee  
18 violated the Act and dismiss this matter.

19 As discussed more fully below, we conclude there is no reason to believe  
20 respondents violated 2 U.S.C. § 439a(a)(5) under either complainant's or the  
21 Committee's view of the facts. If the complainant's claim that Davis became a  
22 "candidate" under Alabama law in January 2009 is true, the polling and other  
23 expenditures by Davis's federal committee for the benefit of his gubernatorial campaign

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1 were permissible pursuant to 2 U.S.C. § 439a(a)(5). If the Commission credits the  
2 Committee's claim that Davis did not become a state candidate until April 17, 2009, we  
3 conclude that the use of the funds was for a lawful purpose not prohibited by 2 U.S.C.  
4 § 439a(b), and therefore permissible pursuant to 2 U.S.C. § 439a(a)(6). Accordingly, we  
5 recommend that the Commission find no reason to believe that The Committee to Re-  
6 Elect Artur Davis to Congress and Byron Perkins, in his official capacity as treasurer,  
7 violated 2 U.S.C. § 439a. Moreover, the complaint contains no information to suggest  
8 that Artur Davis 2010 and Katie Baker, Finance Director of Artur Davis 2010, violated  
9 the Act, and there appears to be no provision in the Act that would prohibit the  
10 acceptance of these funds by the state committee. Therefore, we recommend that the  
11 Commission find no reason to believe that Artur Davis 2010 and Katie Baker, Finance  
12 Director for Artur Davis 2010, violated the Act. We also recommend that the  
13 Commission close the file.

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 **A. Facts**

16 According to the complaint, the Committee first violated Alabama law, and thus  
17 violated 2 U.S.C. § 439a(a)(5), by making expenditures of \$72,000 for Davis's  
18 gubernatorial campaign before June 1, 2009, the date that Alabama law permitted  
19 expenditures by state campaigns for Governor. See Complaint at 1. The complaint  
20 alleges that the Committee spent funds on a poll for Davis's gubernatorial campaign in  
21 January 2009, as evidenced both by a \$27,000 expenditure to Anzalone/Liszt Research  
22 disclosed in the Committee's April 2009 Quarterly Report, and by a January 2009 press  
23 release on Davis's gubernatorial campaign website discussing the results of this poll

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1 without indicating the poll concerned any issues related to a congressional campaign.

2 *Id.* at 2. The complaint also alleges that the Committee spent funds on Davis's  
3 gubernatorial campaign for other expenses before June 1, 2009, such as office rent,  
4 travel expenses, and salary payments, and it cites to an attached news article reporting  
5 that the Committee was transferring an employee to the state campaign. *Id.* at 3 and 4.

6 Complainant alleges the state committee also violated Alabama law by filing a  
7 required campaign committee form late. *Id.* at 2. The complaint claims that, under  
8 Alabama law, Davis's gubernatorial campaign should have filed a principal campaign  
9 committee form in January 2009, when Davis's federal committee spent more than  
10 \$25,000 for the benefit of Davis's state campaign. Davis's gubernatorial committee did  
11 not file this form until April 17, 2009.

12 Additionally, the complaint alleges that the Committee misused federal campaign  
13 funds because it failed to refund contributions made after February 6, 2009, the date that  
14 Congressman Davis announced his candidacy for Governor, as requested by the Reports  
15 Analysis Division ("RAD") in its May 19, 2009, Request for Additional Information  
16 ("RFAI") to the Committee. Even though the Committee responded to RAD that  
17 Congressman Davis became a candidate for Governor on April 17, 2009, the complaint  
18 alleges that the Committee misled the Commission in stating that all financial activity  
19 before April 17, 2009, was for the benefit of his federal campaign. *See* Complaint at 6  
20 and 7. The complaint also points out that the Committee never responded to RAD's  
21 Disavowal Notice in October 2009 directing that Artur Davis file a Statement of  
22 Candidacy or disavow that he was a candidate for Congress. *Id.* at 6.

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1 In support of the claims that the Committee violated 2 U.S.C. § 439(a)(5), the  
2 complaint attached newspaper articles about the Alabama gubernatorial campaign. One  
3 article reported that Davis's federal committee had been paying the state campaign's  
4 administrative costs and quoted a Davis spokesperson as stating that this practice was  
5 temporary until the state campaign account was opened. *See Mary Orndorff, Davis*  
6 *Campaign Gets \$1.1 Million Jump; Congressional Race Money Will aid State bid in*  
7 *2010, Birmingham News, April 17, 2009.* This article also reported that the  
8 spokesperson stated that "the campaign's legal counsel provided an opinion that the  
9 arrangement follows state and federal campaign law because the state campaign staff are  
10 technically still working under the committee to re-elect Davis to Congress in 2010." *Id.*

11 In response, the Committee primarily addresses the allegation that the Committee  
12 violated 2 U.S.C. § 439a(a)(5), which permits donations from federal candidates or  
13 officeholders to state and local candidates "subject to the provisions of State law." *See*  
14 *Committee Response at 2.* The response states that the Commission has interpreted the  
15 quoted language as meaning that a violation of section 439a(a)(5) is not predicated on a  
16 violation of state law, citing MUR 5826 (Mark Green for Congress) (Commission found  
17 no reason to believe Respondents violated section 439(a)(a)(5) where Green's federal  
18 committee transferred funds to Green's state gubernatorial committee, even if the transfer  
19 violated state law). *Id.* at 3. Thus, the Committee requests that the Commission dismiss  
20 this matter. *Id.* at 1. The Committee also states that the complaint only alleges state law  
21 violations in connection with 2 U.S.C. § 439a(a)(5), and does not allege violation of any  
22 other statute or regulation over which the Commission has jurisdiction. *Id.* at 3. Finally,  
23 the Committee states that the complaint presents no facts to support the allegation of

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untimely fundraising or refunds or other misuses of federal campaign funds. *Id.* The response does not specifically address the issue of the Committee's spending for the gubernatorial campaign out of federal campaign funds before Davis officially filed for the gubernatorial election.

**B. Legal Analysis**

Contributions accepted by a candidate may be used for various purposes without violating the Act's "personal use" prohibitions. Section 439(a) of the Act lists five specifically permissible non-campaign uses of such funds, and it also generally permits the use of such funds for any other lawful purpose, unless prohibited by 2 U.S.C. § 439a(b). 2 U.S.C. § 439a(a)(1) through (6); *see also* 11 C.F.R. § 113.2. One of the five specifically-permitted uses is set forth in Section 439a(a)(5), which permits contributions accepted by a federal candidate and any other donation received by an individual as support for activities of the individual as a holder of federal office to be used for donations to state and local candidates "subject to the provisions of State law." Section 439a(b)(1) prohibits the conversion of campaign funds to personal use, and 2 U.S.C. § 439a(b)(2) lists a number of uses that would constitute personal use. This list does not include making donations to state campaigns or uses that violate state law.

Complainant's allegation that the Committee violated 2 U.S.C. § 439a(a)(5) is based on claims that the Committee's expenditures violated Alabama law, but this allegation lacks merit. The Commission determined in MUR 5826 (Mark Green for Congress) that section 439a(a)(5)'s reference to the "provisions of State law" merely affirms the states' authority to regulate the financing of their own elections. *See* Factual and Legal Analysis in MUR 5826. In that matter, complainant alleged that

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1 Representative Mark Green donated from his federal committee to his gubernatorial  
2 committee in violation of Wisconsin law, and hence violated 2 U.S.C. § 439a(a)(5).  
3 The Commission found, however, that this provision, unlike Section 439a(b), is  
4 (1) permissive and not prohibitive; (2) is consistent with the previous guidance in  
5 advisory opinions that the "subject to the provisions of State law" language merely  
6 advises a transferor that state law is not preempted by federal-to-state transfers; and  
7 (3) recognizes that a state is in a better position than the Commission to interpret its own  
8 laws. *Id.* Therefore, the Commission found no reason to believe there was a violation  
9 of the Act because, "a violation of state law does not create a violation of Section  
10 439(a)(a)(5)." *Id.* at 3.

11 Similarly, there is no reason to believe that respondents' alleged violation of  
12 Alabama law results in a section 439a(a)(5) violation, even under complainant's view of  
13 the facts. The complainant alleges that Davis became a "candidate" under Alabama law  
14 as early as January 2009 when the Committee paid \$27,000 for a poll allegedly in  
15 connection with Davis's state campaign several months before the state committee filed  
16 its campaign committee form. Even if that is the case, according to the reasoning in  
17 MUR 5826, the Committee's in-kind donations to Davis's non-federal campaign efforts  
18 were permissible pursuant to 2 U.S.C. § 439a(a)(5).

19 The Committee's view of the facts is that Artur Davis became a state candidate on  
20 April 17, 2009. Although Artur Davis reportedly announced on February 6, 2009, that he  
21 would run for Governor, see Exhibit 4 of the complaint, records at the Alabama Secretary  
22 of State's Office confirm that Davis filed the form for his principal campaign committee  
23 for Governor on April 17, 2009. The Committee also reported that, as of April 17, 2009,

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1 it was no longer accepting contributions for the congressional campaign.<sup>1</sup> The  
2 Committee's response does not deny the complaint's allegations that it used its campaign  
3 funds on polling, office rent, payroll, and other expenses for Davis's gubernatorial  
4 campaign before Davis filed as a state candidate on April 17, 2009, and established a  
5 state campaign committee.<sup>2</sup>

6 If we credit the Committee's assertion that Davis did not become a state  
7 "candidate" until April 17, 2009, then 2 U.S.C. § 439a(a)(5), which covers only  
8 donations to "State candidates," does not apply to the Committee's pre-April 17, 2009,  
9 spending. Even so, that spending appears permissible pursuant to 2 U.S.C. § 439a(a)(6),  
10 which permits campaign funds to be used "for any other lawful purpose unless prohibited  
11 by" 2 U.S.C. § 439a(b).

12 As mentioned above, section 439a(b)(2) states that a contribution accepted by a  
13 candidate or any other donation received by an individual as support for activities of the  
14 individual as a holder of Federal office shall "be considered to be converted to personal  
15 use if the contribution or amount is used to fulfill any commitment, obligation, or  
16 expense of a person that would exist irrespective of the candidate's election campaign or  
17 individual's duties as a holder of Federal office." The provision cites specific examples  
18 of such conversion of contributions or donations: home mortgage payments; rent or  
19 utility payments; a clothing purchase; a non campaign-related automobile expense; a

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<sup>1</sup> The Committee issued a press release on April 16, 2009, stating that it stopped accepting in-state campaign contributions after February 6, 2009, but was continuing to raise limited national funds to pay campaign personnel and overhead costs, and that any funds received after February 6, 2009, would not be transferred to the gubernatorial account in June 2009.

<sup>2</sup> On June 1, 2009, Davis's federal committee donated \$1 million to his gubernatorial committee, a permissible use under 2 U.S.C. § 439a(a)(5) since he had become a state candidate. *See* MUR 5826 (Mark Green for Congress).



1 country club membership; a vacation or other non campaign-related trip; a household  
2 food item; a tuition payment; admission to a sporting event, concert, theater, or other  
3 form of entertainment not associated with an election campaign; and health club or  
4 recreation facility dues or fees. *See also* 11 C.F.R. § 113.1(g)(1)(i)(A) through (J) for  
5 these and other examples. This list is not exhaustive, and the Commission determines on  
6 a "case-by-case basis," whether "other uses of funds in a campaign account fulfill a  
7 commitment, obligation or expense that would exist irrespective of the candidate's  
8 campaign or duties as a Federal officeholder." 11 C.F.R. § 113.1(g)(1)(ii). This regulation  
9 provides specific examples of such other impermissible uses, which do not include in-  
10 kind donations from a federal candidate's or office holder's campaign account to his  
11 or her campaign for state office before becoming a state "candidate." 11 C.F.R.  
12 § 113.1(g)(1)(ii). In applying the case-by-case approach, the Commission "reaffirms its  
13 long-standing opinion that candidates have wide discretion over the use of campaign  
14 funds." *See* Explanation and Justification, Expenditures; Reports by Political  
15 Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (February 9,  
16 1995).

17 In Advisory Opinion 2007-29 (Jesse Jackson, Jr. for Congress), the Commission  
18 used the case-by-case approach in analyzing whether it was permissible for the Jackson  
19 Committee to donate funds to the campaign of Congressman Jackson's wife, Sandi  
20 Jackson, to be the Seventh Ward representative on the Cook County Democratic Party  
21 Committee, a political party office that was not covered by 2 U.S.C. § 439a(a)(5). In  
22 advising that the Jackson Committee could donate the funds to Jackson's wife's  
23 campaign pursuant to section 439a(a)(6) and 11 C.F.R. § 113.2(e), the Commission noted

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1 that the use of the funds was analogous to transfers to political party committees and  
2 donations to state and local candidates, which are permitted by 2 U.S.C. §§ 439a(a)(4)  
3 and (5). In applying the case-by-case approach to the personal-use test, the Commission  
4 reaffirmed its position that candidates have wide discretion over the use of campaign  
5 funds. AO 2007-29 at 3.

6 Likewise, in this matter, even assuming Davis did not become a state "candidate"  
7 until April 17, 2009, the Committee's use of funds before that date for his gubernatorial  
8 campaign was analogous to donations to a state candidate, which are permitted by  
9 2 U.S.C. § 439a(a)(5). Supporting Davis's exploratory efforts before becoming a  
10 candidate is a lawful purpose not specifically prohibited, and the Commission recognizes  
11 candidates have wide discretion over the use of campaign funds. Thus, as in AO 2007-  
12 29, the Committee's use of the funds should be considered permissible under 2 U.S.C.  
13 § 439a(a)(6).<sup>3</sup> We express no position concerning whether the Respondents' activities  
14 were permissible under Alabama law or when Davis became a "candidate" under  
15 Alabama law.

16 In regard to Artur Davis 2010 and Katie Baker, while the complaint alleges illegal  
17 expenditures and misuse of campaign funds by the Committee directly for the benefit of  
18 Artur Davis 2010 and Katie Baker, Finance Director of Artur Davis 2010, it contains no

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<sup>3</sup> The complaint did not allege any reporting violations. On the disclosure reports, the purposes of the expenses included "polling report invoice," "reimbursement campaign travel expenses," "office space - rent and parking," and "payroll," which appear to be adequate descriptions and may have covered mixed federal/state disbursements. The Committee's reporting of these expenses appears to comply with the reporting requirements at 2 U.S.C. § 434(b)(4) and with 11 C.F.R. § 104.3(b)(4)(A), which sets forth examples of adequate descriptions of the purpose of disbursements. However, we believe the Committee could have been more transparent by reporting, perhaps in memo format on the disclosure reports, which disbursements, or portions thereof, were in connection with Davis's gubernatorial exploratory campaign. After it was established, Artur Davis 2010 did not report any receipt of in-kind contributions from the Committee before April 17, 2009.

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1 information to suggest that either of them violated the Act by accepting funds from the  
2 Committee. Moreover, there appears to be no provision of the Act that would prohibit  
3 the state committee from accepting these funds.

4 Based on the above, we recommend that the Commission find no reason to believe  
5 that The Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his  
6 official capacity as treasurer, violated 2 U.S.C. § 439a. We also recommend that the  
7 Commission find no reason to believe that Artur Davis 2010 and Katie Baker, Finance  
8 Director of Artur Davis 2010, violated the Act. Finally, we recommend that the  
9 Commission close the file.<sup>4</sup>

10 **III. RECOMMENDATIONS**

- 11 1. Find no reason to believe that The Committee to Re-Elect Artur Davis to  
12 Congress and Byron Perkins, in his official capacity as treasurer, violated  
13 2 U.S.C. § 439a.  
14  
15 2. Find no reason to believe that Artur Davis 2010 or Katie Baker violated  
16 the Act.  
17  
18 3. Approve the attached Factual and Legal Analyses.  
19  
20 4. Approve the appropriate letters.

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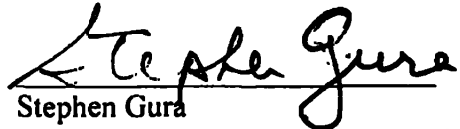
<sup>4</sup> With regard to RAD's RFAI, the Committee stated it had no obligation to refund contributions received after February 6, 2010, because Davis did not become a gubernatorial candidate until April 17, 2009. The Committee's disclosure reports do not reflect receipt of any federal contributions after April 15, 2009. With respect to RAD's October 2009 Disavowal Notice to the Committee, it appears that the Committee never filed a Statement of Candidacy, nor disavowed that Davis was a federal candidate. However, the Committee's earlier response to RAD that Davis became a state candidate on April 17, 2009, coupled with the fact that it stopped accepting contributions after April 15, 2009, appear sufficient to inform the public that Davis was not a candidate for federal office after April 17, 2009.

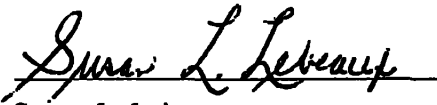
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4   Date

Thomasenia P. Duncan  
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